Supreme Court, U.S.
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No. 99-2072

IN THE

Supreme Court of the United States

HEALY TIBBITTS BUILDERS, INC.,

Petitioner,

v.

ROBERT CABRAL and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED

1. Whether review should be granted to determine whether or not the employer's failure to timely file a notice of appeal of the District Director's orders awarding a fee to the Claimant's attorney, payable by the Employer, under 28 (b) of the Longshore Act, for services in the proceedings before the District Director's office foreclosed appellate review of any issues raised.

2. Whether or not the Ninth Circuit Court of Appeals has correctly interpreted §921 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901, et seq. (the Act), as permitting the Benefits Review Board (Board) to conduct appellate review of a decision by the District Director without a hearing before an Administrative Law Judge even though the dispute presented no relevant factual issue.

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OPINIONS BELOW

The court of appeals Order denying Petitioner's petition for panel rehearing is reprinted as Appendix A of the Petition for writ of certiorari filed by Healy Tibbitts Builders, Inc. It has not been officially reported.

The opinion of the court of appeals, reprinted as Appendix B of the Petition for writ of certiorari filed by Healy Tibbitts Builders, Inc., is officially reported at 201 F.3d 1090 (9th Cir. 2000).

The opinion of the Benefits Review Board, reprinted as Appendix C of the Petition for writ of certiorari filed by Healy Tibbitts Builders, Inc., has not been officially reported.

The Order of the United States Department of Labor, Office of Administrative Law Judges, reprinted as Appendix D of the Petition for writ of certiorari filed by Healy Tibbitts Builders, Inc., has not been officially reported.

The Order of the United States Department of Labor, Office of Administrative Law Judges, reprinted as Appendix E of the Petition for writ of certiorari filed by Healy Tibbitts Builders, Inc., has not been officially reported.

The Compensation Order/Award of Attorney Fees on Reconsideration, reprinted as Appendix F of the Petition for

writ of certiorari filed by Healy Tibbitts Builders, Inc., has not been officially reported.

The Compensation Order/Award of Attorney Fees, reprinted as Appendix G of the Petition for writ of certiorari filed by Healy Tibbitts Builders, Inc., has not been officially reported.

GROUNDS FOR JURISDICTION

The petitioner, Healy Tibbitts Builders, Inc. ("Healy Tibbitts") lacked jurisdiction to appeal the District Director's compensation Order to the Benefits Review Board pursuant to 33 U.S.C. §921(a); 20 C.F.R. §§802.205, 702.350 for failure to file a timely notice of appeal. The Benefits Review Board lacked jurisdiction, and so found, but Healy Tibbitts appealed the decision of the Board within 60 days after issuance of the Order. The Ninth Circuit Court of Appeals considered the matter and in its judgment dated February 2, 2000, found that Healy Tibbitts did not timely file a notice of appeal with the Benefits Review Board within the required 30 day time period after the District Director's ruling became final and affirmed the Benefits Review Board's dismissal of the appeal. On March 28, 2000, Healy Tibbitts' petition for rehearing was denied by the Ninth Circuit Court of Appeals.

This Court lacks jurisdiction under 28 U.S.C. §1254(1) because of Healy Tibbitts' failure to have appealed the original Order within the time allotted.

STATUTORY PROVISIONS INVOLVED

Longshore & Harbor Workers' Compensation Act, 33 U.S.C. §921(a):

> A compensation Order shall become effective when filed in the office of the Deputy Commissioner as provided in §19 and, unless proceedings for the suspension or setting aside of such Order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

STATEMENT OF THE CASE

On April 5, 1995, an Administrative Law Judge ("ALJ") awarded Robert Cabral ("Cabral") limited medical benefits under Section 907 of the Longshore Harbor Workers' Compensation Act ("LHWCA") for an injury sustained while employed at Healy Tibbitts. The ALJ directed Cabral's attorney to file a fee application for his reasonably necessary work performed on behalf of the claim. Respondent, Cabral's attorney, Jay Lawrence Friedheim, submitted an application requesting $795.00 in fees for work performed before the District Director from March 20 through April 18, 1995, the date on which Cabral's claims were transferred to the Office of the Administrative Law Judge ("OALJ"). On December 6, 1996, the District Director awarded $322.50 in attorney's fees for the work performed before her office. Healy Tibbitts filed a motion for reconsideration, which included a "formal request for a hearing on the matter [before an ALJ] pursuant to 20 C.F.R. §702.316." Healy Tibbittts' motion was denied and the District Director reduced the award of attorney's fees to $309.50, as a result of a mathematical error in the initial Order.

On January 2, 1997, Healy Tibbitts requested a hearing before an ALJ on the $309.50 attorney's fee award order. The District Director transferred the matter to the OALJ. The Associate Chief ALJ, *sua sponte* dismissed the proceeding on the ground that the OALJ lacked subject matter jurisdiction and entered an Order on January 29, 1997. Healy Tibbitts submitted a request for reconsideration and

the Associate Chief ALJ issued an amended Order of dismissal on April 2, 1997.

On June 12, 1997, Healy Tibbitts filed a "petition for review and supporting brief." On March 24, 1998, the Benefits Review Board ("BRB") affirmed the District Director's compensation Order awarding attorney's fees, finding that the Healy Tibbitts did not file an appeal to the Board within thirty days of the date that the District Director's Order on reconsideration was filed on December 24, 1996. Citing, 33 U.S.C. §921(a); 20 C.F.R. §§801.205, 702.350; Porter v. Kwajalein Services, Inc., 31 BRBS 112 (1997); Ins. Co. of North America v. Gee, 702 F.2d 411, 15 BRBS 107 (CRT) (2nd Cir. 1983).

On February 2, 2000, the Ninth Circuit Court of Appeals filed their opinion finding that the BRB properly dismissed Healy Tibbitts' appeal of District Director's Order because Healy Tibbitts did not file an appeal to the Board until almost 120 days after the District Director's Order became final. On March 28, 2000, the Ninth Circuit Court of Appeals issued an Order denying Healy Tibbitts' petition for a rehearing *en banc* . On June 23, 2000, Healy Tibbitts filed a petition filed a petition for writ of certiorari.

Decisions of the BRB are reviewed for errors of law and adherence to the substantial evidence standard. Duhagon v. Metropolitan Stevedore Co., 169 F.3d 615 (9th Cir. 1999).

ARGUMENT

A. Reasons for Denying the Petition

I. Petitioner's Argument Never Addresses Their Failure to File a Timely Notice of Appeal

The decision of the BRB found that Healy Tibbitts did not file an appeal with the BRB within the required thirty days after the District Director's ruling became final. 33 U.S.C. §921(a); 20 C.F.R. §§802.205. The BRB found that Healy Tibbitts' request for a hearing before an ALJ did not constitute an appeal to the BRB.

The BRB found that the the Board lacked jurisdiction to review the merits of the District Director's compensation Orders awarding an attorney's fees as employer [Healy Tibbitts] did not file an appeal to the Board within thirty days of the date that the District Director's Order on reconsideration was filed on December 24, 1996, citing, 33 U.S.C. §921(a); 20 C.F.R. §§801.205, 702.350; Porter v. Kwajalein Services, Inc., 31 BRBS 112 (1997); Ins. Co. of North America v. Gee, 702 F.2d 411, 15 BRBS 107 (CRT) (2nd Cir. 1983).

In Porter, 31 BRBS at 114, the Board found that the Board lacked jurisdiction to review the merits of the ALJ's Decision and Order approving the settlement of a claim because the claimant did not file an appeal to the Board within

thirty days of the date that the Decision was filed. Citing, 33 U.S.C. §921(a); 20 C.F.R. §207.350. The case went on to consider that the Boards' regulations provide that a notice of appeal filed with another governmental agency shall be considered filed with the Board as of the date that it was received by that governmental agency where it is in the interest of justice to do so, citing, 20 C.F.R. §802.207(a)(2). The Board found that the claimant's motion in Porter, *supra*, was not a notice of appeal to the Board. In Porter, *supra*, it was found that the motion was directed to the ALJ, who ruled on it and the Board found that this did not evince an intent to seek Board review of the approved settlement. The BRB specifically found in Porter, *supra*, that in addition to the motion to rescind the settlement, the claimant sought a new formal hearing. The Board ruled that that indicated that the claimant sought further proceedings before the ALJ and not appellate review. The Board held that it was not in the interest of justice to consider the claimant's motion to rescind as a timely appeal of the ALJ's Order approving the settlement under §8(i). Porter, *supra*, was about compensation due to a claimant, i.e. it was a "claim."

Similarly, in our case, Healy Tibbitts in its efforts to insist upon its absolute right to a hearing before an ALJ, on the $309.50 attorney's fees awarded by the District Director, ignored its obligations under the law to file a timely notice of appeal to the BRB, and instead filed an LS-18 seeking a hearing on the merits of the award of the $309.50 attorney's fees claiming factual disputes previously not raised before the District director as the basis of the need for the hearing.

Petitioner Healy Tibbitts in this petition for writ of certiorari has not addressed in any way their own failure to file a timely appeal; therefore, it is not really possible to refute their arguments explaining this fatal oversight. Healy Tibbitts did not address this issue in their appeal of the BRB's decision to the Ninth Circuit Court of Appeals. Because they failed to raise any arguments they might have had below, perhaps they have accordingly waived their right and this Court should decline to consider their petition for certiorari. See, Grupo Mexicano v. Alliance Bond, 527 U.S. ____, 119 S.Ct. ____, 144 L.Ed. 2d 319, 330 n.3 (1999); Matsushita Electric Indus. v. Epstein, 516 U.S. 367, 379 n.5, 116 S.Ct. 873, 134 L.Ed. 2d 6 (1996); Holly Farms Corp. v. NLRB, 517 U.S. 392, 400 n.7, 116 S.Ct. 1396, 134 L.Ed.2d 593 (1996).

II. Review Is Not Necessary to Determine Whether the Ninth Circuit's Decision Conflicts With The Plain Statutory Language

The LHWCA was set up to handle the "claims" of injured workers and provides for an adjudicative function to determine the merits of the injured worker's claims for compensation from their employers. Incidental to the primary function of the Act of assisting injured workers to a timely recovery of health care and other benefits, there are certain administrative aspects which allow for the award of attorney's fees for a claimant's attorney who successfully or par

tially successfully pursues a claim for benefits for the injured worker. The Act in part achieves its purpose by encouraging attorneys to pursue meritorious claims by holding out the prospect of getting paid in a timely fashion for the work performed in representing the injured worker in their claim for workers' compensation benefits. As pointed out in the Ninth Circuit opinion in note 5, neither the Act nor its regulations define "claim" The regulations governing attorney's fees at least implicitly make a distinction between a "claim." and the attorney's fees themselves, citing, 20 C.F.R.§207.132(a) ("any person seeking a fee for services performed on behalf of a claimant with respect to claims filed under the Act shall make application therefore . . ."). When congress changed the adjudication of Longshore claims in 1972, it assigned factual disputes to formal hearings conducted by ALJs. However, District Directors retained limited jurisdiction to act in two specific areas; medical management and attorneys fees. There is no specific provision which exists to refer District Directors decisions to ALJs when one party disputes a decision on an issue such as an attorney's fee award by a District Director. The Ninth Circuit's decision has now joined the majority in holding that in such a case, when there are no factual issues in dispute, the party challenging a fee award does not have a right to a hearing before an ALJ, but must appeal directly to the BRB.

Only the Seventh Circuit in Pearce v. Director, OWCP, 647 F.2d 716 (7th Cir1981) has held that under the Act any party, including an employer, is absolutely entitled to a hearing on a claim as a matter of right. . The Fifth

Circuit and the BRB have rejected such a broad reading and the Ninth Circuit has now joined their interpretation. Oceanic Butler, Inc. v. Nordahl, 842 F.2d 773 (5th Cir. 1988) and Tupper v. Teledyne Movable Offshore, 13 BRBS 615 (1981)

The 1972 amendments to the Act transferred the hearings function to ALJs on disputed factual issues regarding claims but it did not address matters on which hearings were not held prior to 1972. The amendments did not confer a new right of hearing where none previously existed. Since 1972, the Director, OWCP, and the Board, have consistently maintained that purely legal issues are not within the jurisdiction of ALJs, and particularly the disputes about the adequacy of fee awards for work performed before the OWCP are solely within the District Director's discretion. Ellis v. Blake Constr. Co., 8 BRBS 650 (1978); Mazella v. United Terminals, Inc., 8 BRBS 755 (1978); Lawson v. Atlantic & Golf Stevedores, 9 BRBS 855 (1979); Lonergan v. Iras Bushey & Sons, Inc., 11 BRBS 345 (1979); Champagne v. Main Iron Works, Inc., 20 BRBS 84 (1987). The Fifth Circuit has twice affirmed this view, Oceanic Butler, *supra*; Lauzon v. Strachan Shipping Co., 602 F.Supp. 61, 664 (S.D. Tex.), *aff'd.*, 782 F.2d 1217, 1222 (5th Cir. 1985).

As the Ninth Circuit observed in our opinion, the Seventh Circuit's opinion in Pearce, *supra*, did not appear to consider the overall statutory structure which requires considering §19(c) and §19(d). Pearce, *supra*, considered a claim for benefits by a worker on an issue very different from that presented by this Cabral OWCP attorney's fee order appeal. In Pearce, *supra*, a recipient of benefits under a LHWCA claim sought review of a final order of the BRB

affirming the Deputy Commissioner's refusal to commute his bi-weekly benefits into a lump-sum compensation award. This activity by the Deputy Director was outside of the limited authority to act in the two specific areas of medical management and attorney's fees reserved to the District Directors after the 1972 amendments.

In Pearce, *supra*, the Court found that "it was the plain duty of the Commissioner to transfer the case to the Chief Administrative Law Judge for a hearing in which findings of fact and conclusions of law could be made and a compensation order entered by the Administrative Law Judge." Pearce, 647 F.2d at 724. The Pearce, *supra*, case was a matter that considered the adjudication of an injured worker's claim for compensation and not a collateral administrative issue, such as the approval of attorney's fees for work done before the OWCP prior to the time that a claim is transferred to the OALJ for a hearing of the claim on its merits. As stated in Pearce, *supra*, at 726, the Statutes of regulations make no distinction between administrative and adjudicatory actions in regards to an application of an injured worker's claim for compensation. "They apply equally to all claims and applications for workers' compensation benefits which are disputed or controverted." The administrative function in Pearce, *supra*, still related to the claim, the consolidation of the future compensation benefits due to the Claimant into a lump sum award payable to the claimant.

Similarly, Oceanic Butler, Inc., *supra*, involved a decision upholding a compromise and release settlement of

lifetime disability claims entered into by a worker who then died a week after the settlement was reached. It further included a dispute about whether or not the employer and insurer were entitled to offset the settlement against liability to the widow for death benefits. Again, this is a claim for benefits by an injured worker under the Act, and not a mere administrative proceeding such as a fee petition for a claimant's attorney who had successfully obtained benefits for an injured worker for work performed in representation of the injured worker's claim before the OWCP.

Lauzon v. Strachan Shipping Co., 602 F.Supp. 661 (S.D.Tex. 1985) was an action where a longshoreman sought to enforce a supplemental order by a Deputy Commissioner finding the employer was in default of an obligation to pay a compensation award to a claimant. It was found there that the Deputy Commissioner did not err in denying an employer's request for an official hearing before an impartial ALJ regarding whether or not the payment was tardy. It was undisputed that the longshoreman claimant did not timely receive payment of compensation for his claim from the employer. There it was found that an informal hearing was unnecessary because the application of the twenty percent penalty for overdue payments of compensation to the claimant of §914(f) was mandatory unless the employer had appealed the compensation order, and had obtained a Board or court order staying payments. A hearing is necessary only when there exists a genuine issue of disputed fact directly regarding the claim for compensation benefits.

When the matter was appealed to the Fifth Circuit Court of Appeals in Lauzon, *supra*, it was found that the Deputy Commissioner could issue an order "following an informal conference at which agreement is reached on all issues." 20 C.F.R §702.315(a). The material facts in that case were undisputed. Those facts were related to an employee's right to compensation under the Act, not to the approval of attorneys fees for work performed by this lawyer before the District Director at the local office of the OWCP.

CONCLUSION

For all of the foregoing reasons, the petition must be denied in all respects because of the employer's failure to file a timely notice of appeal. This case does not raise any significant issues nor will it have any impact on any decision. A denial of the petition for certiorari will reaffirm the right of the District Director to act in the very limited area of approving attorneys fees for work done in front of the District Director by attorneys or representatives of claimants who successfully pursue an injured worker's rights to compensation under the Act.

Respectfully submitted,

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